Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as 'Boustead Trading (1985) Sdn Bhd')

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO DL–22–1919 OF 1999

MOHD HISHAMUDIN J

21 JULY 2008

Companies and Corporations — Liquidators — Powers of — Whether solicitors appointed by official receiver/liquidator had locus standi to commence application — Whether solicitors were appointed by liquidator or former director of plaintiff company

Under a stockist agreement, the plaintiff had appointed the defendant as a stockist for the plaintiff's consumer products. In 1999, the plaintiff filed a suit against the defendant for a sum of RM41,377,320 in respect of goods supplied and delivered to the defendant by the plaintiff pursuant to the stockist agreement. However, on 28 September 2004, a winding up order was made against the plaintiff and the official receiver was appointed as the liquidator. The present inter parte application was by the official receiver and liquidator/plaintiff company ('the official receiver') against the defendant for a mareva injunction to restrain the defendant from transferring its assets to any third party. The official receiver alleged that the application was filed by solicitors appointed by the official receiver under s 236(2)(a) of the Companies Act 1965 ('the Act'). It was the defendant's submission that s 236(2)(a) of the Act does not confer on the official receiver the power to appoint an advocate for the purpose of these proceedings and that the power to appoint an advocate and solicitor for these proceedings is conferred by s 236(1)(e) of the Act and not s 236(2)(a). The defendant further submitted that before the appointment under s 236(1)(e) of the Act was made, the authority of either the court or the committee of inspection must first be obtained and that in the present case this had not been done. Therefore it was the defendant's contention that the advocate and solicitors for the official receiver had no locus standi in these proceedings and that since the appointment was not valid the filing of the application by them was also not valid. The issue before this court was therefore whether the solicitor appointed by the official receiver had locus standi and also whether he was appointed by the official receiver.

Held, dismissing the application with costs:

(1) The official receiver and liquidator cannot appoint an advocate and solicitor to bring or defend an action or other legal proceeding solely by relying on s 236(2)(a) of the Act independently of s 236(1)(e) of the Act. By reason of s 236(1)(e) of the Act a liquidator must obtain the prior authority of the court or the committee of inspection before appointing an advocate for the purpose of defending or bringing an action or any other legal proceeding. In the present case there was no such authorisation in respect of the appointment of solicitors by the official receiver (see paras 17 & 30).

(2) Even assuming the official receiver and liquidator could appoint an advocate and solicitor to institute or defend an action, solely by relying on s 236(2)(a) of the Act there was nevertheless no evidence of any letter of appointment issued by the official receiver to the solicitors for the purpose of prosecuting the plaintiff's claim in the present case. The purported letters of appointment relied upon by the official receiver to show the appointment of the solicitors were not made on the official receiver's own motion but on an application of a former director of the plaintiff company with the official receiver being merely an approving authority. Therefore, in filing this application the solicitors took instructions from the former director rather than from the official receiver. It followed therefore that since the appointment of the solicitors was invalid and that the filing of this application was on the instructions of the former director, who in law was not authorised to give such instructions, that the filing of the present application was also not valid (see paras 21, 22 & 30).

[Bahasa Malaysia summary

Di dalam perjanjian stokis, plaintif telah melantik defendan sebagai stokis untuk produk pengguna plaintif. Dalam tahun 1999, plaintif memfail guaman terhadap defendan bagi jumlah RM41,377,320 bagi barangan yang dibekal dan dihantar kepada defendan oleh plaintif menurut perjanjian stokis tersebut. Walau bagaimanapun, pada 28 September 2004, perintah penggulungan telah dibuat terhadap plaintif dan pegawai penerima telah dilantik sebagai pelikuidasi. Permohonan inter parte ini adalah oleh pegawai penerima dan syarikat pelikuidasi/plaintif ('pegawai penerima') terhadap defendan bagi satu injuksi mareva untuk menghalang defendan dari memindah milik aset-asetnya kepada mana-mana pihak ketiga. Pegawai penerima mendakwa bahawa permohonan tersebut telah difailkan oleh peguam-peguam yang dilantik oleh pegawai penerima di bawah s 236(2)(a) Akta Syarikat 1965 ('Akta tersebut'). Ianya adalah penghujahan defendan bahawa s 236(2)(a) Akta tersebut tidak memberikan kuasa kepada pegawai

penerima untuk melantik seorang peguambela dan peguamcara untuk prosiding-prosiding tersebut dan bahawa kuasa untuk melantik seorang peguambela dan peguamcara untuk prosiding-prosiding tersebut adalah diberikan oleh s 236(1)(e) Akta tersebut dan bukan s 236(2)(a). Defendan seterusnya menghujah bahawa sebelum pelantikan di bawah 236(1)(e) Akta tersebut dibuat, autoriti sama ada mahkamah atau jawatankuasa penyiasatan harus diperolehi terlebih dahulu dan dalam kes ini ia tidak dibuat. Oleh itu, ia adalah hujahan defendan bahawa peguambela dan peguamcara bagi pegawai penerima tidak mempunyai locus standi dalam prosiding-prosiding ini dan memandangkan perlantikan itu tidak sah, pemfailan permohonan oleh mereka juga tidak sah. Isu di mahkamah ini oleh itu adalah sama ada peguamcara yang dilantik oleh pegawai penerima mempunyai locus standi dan juga sama ada beliau telah dilantik oleh pegawai penerima.

Diputuskan, menolak permohonan dengan kos:

(1) Pegawai penerima dan pelikuidasi tidak boleh melantik peguambela dan peguamcara untuk membawa atau membela sesuatu tindakan atau prosiding perundangan yang lain hanya dengan bergantung kepada s 236(2)(a) Akta tersebut tanpa mengambilkira s 236(1)(e) Akta tersebut. Dengan sebab s 236(1)(e) Akta tersebut seseorang pelikuidasi mesti memperolehi sebelumnya autoriti mahkamah atau jawatankuasa penyiasatan sebelum melantik seorang peguambela bagi tujuan mempertahankan atau membawa tindakan atau sebarang prosiding undang-undang yang lain. Dalam kes ini tidak terdapat pemberian kuasa seumpamanya berkaitan dengan pelantikan peguamcara-peguamcara oleh pegawai penerima (lihat perenggan 17 & 30).

(2) Walaupun mengandaikan pegawai penerima dan pelikuidasi boleh melantik seorang peguambela dan peguamcara untuk memulakan atau mempertahankan sesuatu tindakan, hanya dengan bergantung kepada s 236(2)(a) Akta tersebut walau bagaimanapun tidak terdapat sebarang bukti dalam sebarang surat perlantikan yang dikeluarkan oleh pegawai penerima oleh peguamcara bagi tujuan mendakwa tuntutan plaintif dalam kes ini. Surat-surat pelantikan yang bertujuan yang disandar oleh pegawai penerima untuk menunjukkan pelantikan peguamcara-peguamcara tidak dibuat di atas usul pegawai penerima sendiri tetapi di atas permohonan oleh seorang bekas pengarah syarikat plaintif dengan pegawai penerima sebagai hanya autoriti yang meluluskan. Oleh itu, dalam memfail permohonan ini peguamcara menurut perintah-perintah dari bekas pengarah tersebut daripada menurut pegawai penerima. Oleh itu memandangkan pelantikan peguamcara-peguamcara adalah tidak sah dan pemfailan permohonan

ini adalah di atas perintah bekas pengarah tersebut, yang mana dalam undang-undang tidak ditauliah untuk memberi perintah-perintah sedemikan, maka pemfailan permohonan ini adalah juga tidak sah (lihat perenggan 21, 22 & 30).]

Notes

For cases on liquidators in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 432–433.

Cases referred to

Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor [1993] 1 MLJ 119 (folld)

Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd [1999] 4 MLJ 262 (not folld)

Official Receiver and Provisional Liquidator of Maril-Rionebel (M) Sdn Bhd (formerly known as Kredin Sdn Bhd) v Anafartala Cadessi Sdn Bhd [2006] 4 MLJ 1 (refd)

Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam (as Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor [1994] MLJU 429; [1994] 4 CLJ 899 (refd)

Subterranean Natural Mineral Water Sdn Bhd v Kho Boon Kwang [2002] 2 MLJ 439 (refd)

Legislation referred to

Companies Act 1965 ss 236(1)(e), 236(2)(a), 236(3)
Interpretation Acts 1948 and 1967 s 3

John Clark (Bartholomew Lopez with him) (Sidek Teoh Wong & Dennis) for the liquidator/plaintiff.
Fahri Azzat (Azzat and Izzat) for the defendant.
Fajrul Shihar bt Abu Samah (Senior Federal Counsel) for the official receiver/liquidator.

Mohd Hishamudin J:

[1] Enclosure 125 is an inter parte application by the official receiver and liquidator/plaintiff company for a Mareva injunction against the defendant company to restrain the defendant from transferring its assets to any third party.

[2] I have dismissed the application with costs and I shall now give my grounds.

[3] The present suit against the defendant was filed in 1999. The plaintiff is claiming against the defendant a sum of RM41,377,320 in respect of goods supplied and delivered to the defendant by the plaintiff pursuant to a stockist agreement. Under this agreement the plaintiff had appointed the defendant as a stockist for the plaintiff's consumer products.

[4] However, on 28 September 2004, a winding up order was made against the plaintiff. The official receiver was appointed as the liquidator.

[5] The summons in chambers vide encl 125 was filed by Messrs Sidek Teoh Wong & Dennis ('Messrs Sidek Teoh') purportedly on behalf of the official receiver and liquidator/plaintiff in August 2007. The supporting affidavits for the application were all filed by the same firm of solicitors.

[6] Learned counsel for the official receiver and liquidator/plaintiff, Encik John Clark, submits that Messrs Sidek Teoh was duly appointed by the official receiver and liquidator pursuant to s 236(2)(a) of the Companies Act 1965 to act for the plaintiff in these proceedings. Encik John Clark argues that, by reason of s 236(2)(a), the official receiver has the power to make such an appointment. Section 236(2)(a) reads:

> 236 Powers of liquidator.
>
> (1) ...
>
> (2) The liquidator may —
>
> (a) bring or defend any action or other legal proceeding in the name and on behalf of the company;

[7] In support of his argument, Encik John Clark relies on the following cases:

(1) *Subterranean Natural Mineral Water Sdn Bhd v Kho Boon Kwang* [2002] 2 MLJ 439;

(2) *Selvam Holdings (Malayasia) Sdn Bhd v Toby Lam (as Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor* [1994] MLJU 429; [1994] 4 CLJ 899; and

(3) *Official Receiver and Provisional Liquidator of Maril-Rionebel (M) Sdn Bhd (formerly known as Kredin Sdn Bhd) v Anafartala Cadessi Sdn Bhd* [2006] 4 MLJ 1.

[8] In *Selvam Holdings*, Abdul Aziz Mohamad J (as he then was) said:

> The second point is that s 236(1)(e) does not apply to the appointment of an advocate and solicitor to defend a liquidator against a suit arising out of the performance of his duties as liquidator. Paragraph (e) of s 236(1) speaks of the appointment of an advocate by a liquidator 'to assist him in his duties'. In my opinion the duties envisaged are the ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence. It is only that kind of duties that the words 'to assist' can comfortably go along with.
>
> When a liquidator is sued, as in this case, the liquidator has a problem which falls outside his professional competence as liquidator and for which he must engage an advocate and solicitor to represent him to resist the suit. The first respondent's duty to resist this application is not, in my opinion, one of a kind intended by the word 'duties' in para (e), and counsel acting for him in this case cannot be said to have been appointed by him 'to assist him in his duties'.
>
> As to whether a liquidator's power to appoint an advocate to defend him in an action brought against him falls under s 236(2)(a) or (i) is a secondary question. Paragraph (i) of s 236(2) — which gives power to 'appoint an agent to do any business which the liquidator is unable to do himself' — appears to be wide enough to enable a liquidator to appoint an advocate and solicitor to defend him. If in defending this application the first respondent can be said to be doing so 'in the name and on behalf' of the applicant, I would decidedly say he had power, under para (a) of s 236(2), to appoint an advocate and solicitor because to defend any action he must necessarily engage an advocate and solicitor. Whatever the position may be under s 236(2), as long as the first respondent is not caught by para (e) of s 236(1) — and I do not think he is — he does not need to get the authority either of the court or of the committee of inspection to appoint an advocate and solicitor.

[9] Puan Fajrul Shihar bt Abu Samah, the learned senior federal counsel, appearing for the official receiver, also adopts the same view, citing:

(1) *Subterranean Natural Mineral Water*;

(2) *Selvam Holdings*; and

(3) *Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd* [1999] 4 MLJ 262.

[10] Ian Chin J, in *Kang Wah Construction*, adopted the reasoning of Abdul Aziz Mohamad J in *Selvam Holdings (M) Sdn Bhd*. However, His Lordship also advanced the alternative argument that:

> … even assuming that the court's authority is required, the absence of such an authority does not render the action incompetent nor the advocate lacking locus standi since he was appointed by the liquidator and the lack of the authority of the court or committee of inspection only goes towards the question of whether the

liquidator is entitled to costs out of the estate or that he should personally bear the costs (*Dublin City Distillery v Doherty* [1914] AC 823).

[11] It is, however, to be observed that there is a problem with the position taken by Puan Fajrul. The problem is that the submission of Puan Fajrul Shihar is, with respect, inconsistent with the position taken by Puan Yusnita Wagino, the Director of Insolvency for the Federal Territory whose letter is exhibited (exh D) by the plaintiff in its affidavit at encl 132. Puan Yusnita, in her letter of 16 March 2005 to one Encik Khaidzir bin Hj Ishak, a former director of the plaintiff company, approving his application to appoint Messrs Sidek Teoh as the advocate for the defendant company, states that the appointment of Messrs Sidek Teoh was made pursuant to s 236(1)(e) of the Companies Act. When I pointed out this inconsistency to the learned senior federal counsel, her reply was that there is a mistake in the letter in that the intention of the Department of Insolvency was to appoint Messrs Sidek Teoh pursuant to s 236(2)(a) and not pursuant to s 236(1)(e). On my part, in the absence of any affidavit evidence by Puan Yusnita to the effect that the reference to s 236(1)(e) in her letter is a mistake, I am with respect unable to accept Puan Fajrul's assertion from the bar that there is a mistake in the letter. This means that I am taking it as evidence that the appointment of Messrs Sidek Teoh was pursuant to s 236(1)(e) and not pursuant to s 236(2)(a).

[12] Learned counsel for the defendant, Encik Fahri Azzat, on the other hand, argues that s 236(2)(a) does not confer on the official receiver any power to appoint an advocate for the purpose of these proceedings. He submits that s 236(2)(a) only confers on the official receiver the power to bring or defend any action or other legal proceeding in the name and on behalf of the company — and that is all. The learned counsel contends that the power to appoint an advocate and solicitor for the purpose of these proceedings is conferred by s 236(1)(e) of the Act, and not by s 236(2)(a); and that, before the appointment is made, the authority of either the court or the committee of inspection must first be obtained. Encik Fahri Azzat argues that since in the present case no authority had been obtained from either the court or the committee of inspection (that there is no such authority obtained from either the court or the committee of inspection is not disputed), therefore, the appointment of Messrs Sidek Teoh as solicitors for the plaintiff, for the purpose of the application at encl 125, was null and void; and since the appointment was not valid, it must also follow then that the filing of the application (ie encl 125) is also not valid. Accordingly, learned counsel for the defendant, urges this court to dismiss encl 125 with costs.

[13] Section 236(1)(e) provides:

(1) The liquidator may with the authority either of the Court or of the committee of inspection —

(e) appoint an advocate to assist him in his duties. A

[14] For his proposition Encik Fahri Azzat relies on *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor* [1993] 1 MLJ 119.

[15] In order to fortify his argument, Encik Fahri Azzat also refers to s 236(3) which provides: B

(1) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. C

[16] In *Bensa*, James Foong J (as he then was) said:

One further point that arose during the course of trial was the allegation that Mr Ong Ban Chai, counsel for the liquidator has no locus standi in these proceedings under s 236(1)(e) of the Companies Act. Further, the actions of the liquidator in bringing this motion to court is void under s 236(2) and (3) of the Companies Act. D

Section 236(1)(e) of the Companies Act states as follows: E

(1) The liquidator may with the authority either of the Court or of the committee of inspection —

(e) appoint an advocate to assist him in his duties.

There is no evidence of such authority granted by the court or by the committee of inspection. Mr Ong Ban Chai of course argued that though the court's permission was not obtained, the committee of inspection could grant such authority. This to him should be an internal affair of the company. I cannot accept this contention in the absence of any evidence to show that the committee of inspection has granted such authority. Section 236(1)(e) of the Companies Act clearly lays down such a requirement and when challenged, proof must be tendered that such authority does exist and one cannot just by a mere wave of the hand dismiss it as an internal arrangement. F G

As for s 236(2) of the Companies Act which involves various activities of the liquidator in carrying out his duties to wind-up the affairs of the company and distribute its assets, the court shall as provided by s 236(3) of the Companies Act have only a control over such matters. 'Control' unlike 'authority' as stated in s 236(1) of the Companies Act is that it (the liquidator) can commence actions but subject to the approval of the court. As for 'authority', one cannot even begin to commence unless authority or permission is granted. As for this contention, I find that the acts of the liquidator in bringing this motion to court is not void under s 236(2) & (3) of the Companies Act but, the appointment of Ong Ban Chai as an advocate to assist the liquidator is. H I

[17] In my judgment I am in agreement with the decision of James Foong J in *Bensa* that by reason of s 236(1)(e) a liquidator must obtained prior authority of the court or the committee of inspection before appointing an advocate for the purpose of defending or bringing an action or any other legal proceeding. Now, it is significant to note that s 236(1)(e) uses the word 'advocate' ('appoint an advocate') and not 'solicitor'; and this word 'advocate' is given a wide meaning by s 3 of the Interpretation Acts 1948 and 1967. This section defines 'advocate' as follows:

> 'advocate' means a person entitled to practice as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia;

[18] It is my view that the word 'duties' in s 236(1)(e) includes the duties of the liquidator in deciding as to whether or not to defend or to bring an action or any other legal proceeding as well as the duty to appear in court for the purpose of the action or legal proceeding. As one of the works of an advocate is to also appear in court proceedings, besides doing works that are normally associated with solicitors, such as conveyancing, giving of legal advice and drafting of agreements, it would be contrary to the meaning of 'advocate' as defined in the Interpretation Acts if we were to give the word 'duties' a narrow interpretation so as to confine 'duties' to only to 'ordinary administrative and management duties of a liquidator' (as was done by Abdul Aziz Mohamed J in *Selvam Holdings*).

[19] With respect, I am also unable to agree with the views of Ian Chin J in *Kang Wah Construction* that the absence of authority of the court or of the committee would not render the action incompetent or the advocate to lack locus standi.

[20] Now, assuming I am wrong in my above ruling and that, in appointing an advocate for the purpose of carrying out the liquidator's duties under s 236(2)(a), the liquidator is not subject to s 236(1)(e), meaning that the liquidator need not have to obtain the prior authority of either the court or the committee of inspection, still, in the present case, the question arises as to whether Messrs Sidek Teoh has been duly appointed by the official receiver and liquidator? Encik John Clark for the plaintiff argues that he has, and the senior federal counsel, for the official receiver, argues likewise. But Encik Fahri Azzat submits that there has been no appointment made by the official receiver.

[21] The purported letters of appointment relied upon by the official receiver and liquidator/plaintiff are exh D of encl 132 and exh A of encl 124. Exhibit D reads as follows:

Ruj. Kami: PPT(WP)484/2004/G

Tarikh: 16.3.05

Encik Khaidzir Bin Haji Ishak

No. 38, Lot 8741, Rawang Industrial Estate

48000 Rawang

Selangor Darul Ehsan

Tuan,

Dalam Perkara MTKL Penggulungan Syarikat No: D5-28-247-2003

Ber : Zaitun Marketing Sdn Bhd

Per : Permohonan di bawah Seksyen 236 (1)(e) Akta Syarikat 1965

1. MTKL Guaman No: S6-22-256-2000

Zaitun Marketing Sdn. Bhd … Plaintif

Lwn

Kumpulan Jaya Pemasaran Sdn. Bhd.

Harrisons Trading (Sabah) Sdn. Bhd.

Harrisons Trading (Sarawak) Sdn. Bhd.

Harrisons Trading Peninsular Sdn. Bhd.... Defendan-Defendan

2. MTKL Guaman No: S3-22-131-2000

Zaitun Marketing Sdn. Bhd.... Plaintif

Lwn

Harpers Trading Sdn. Bhd....Defendan

3. MTKL Guaman No. D1-22-1919-99.

Zaitun Marketing Sdn. Bhd... Plaintif

Lwn.

Boustead Trading [1985] Sdn. Bhd.... Defendan

Adalah saya dengan segala hormatnya merujuk kepada perkara tersebut di atas.

2. Selanjutnya adalah dimaklumkan bahawa permohonan tuan untuk melantik Tetuan Sidek Teoh Wong & Dennis untuk mewakili syarikat bagi kes-kes guaman di atas adalah dibenarkan tertakluk syarat-syarat seperti berikut:-

Bahawa bekas pengarah hendaklah mendapatkan seorang penjamin dan penjamin tersebut hendaklah menandatangani satu surat Akujanji di pejabat kami [arahan Jabatan (Perundangan) Bil 3/94] dan mendepositkan sejumlah RM10,000.00 sebagai jaminan kos bagi setiap kes di atas;

A Bahawa peguam yang mewakili syarikat dalam kes-kes tersebut juga hendaklah memberi satu surat Akujanji bahawa beliau dan atau firmanya tidak akan membuat apa-apa tuntutan kos, perbelanjaan atau apa-apa bayaran terhadap Pegawai Penerima;

B Bahawa Pegawai Penerima tidak akan bertanggungjawab sama sekali di atas apa-apa kegagalan yang melibatkan kes-kes di atas;

Bahawa peguam yang mengendalikan kes-kes ini hendaklah memberitahu Pegawai Penerima perkembangan kes tersebut dari masa ke semasa;

C Sekiranya berjaya di dalam tuntutan tersebut, segala tuntutan yang diperolehi hendaklah diserahkan kepada Pegawai Penerima bagi dimasukkan ke dalam estet syarikat untuk diagihkan kepada semua pemiutang.

3. Sekian untuk makluman dan tindakan tuan selanjutnya. Sekian terima kasih.

'BERKHIDMAT UNTUK NEGARA'

D Saya yang menurut perintah,

t.t.

[YUSNITA BINTI WAGINO]

b.p. Pengarah Insolvensi Negeri

E Cawangan Wilayah Persekutuan

Jabatan Insolvensi Malaysia

S.K

F Tetuan Sidek Teoh Wong & Dennis

Peguambela & Peguamcara

Level 32, Menara TH Perdana

1001, Jalan Sultan Ismail

G 50250 Kuala Lumpur

Rujukan tuan: JCS/LCH/GL/1038/02/ZMSB & BCL/MAIN/0088/99/ZMSB

H **[22]** The appointment of Messrs Sidek Teoh was not made on the official receiver's own motion but on an application of a former director of the plaintiff, one Encik Khaidzir bin Haji Ishak.

[23] Exhibit A of encl 124 reads as follows:

I Ruj. Kami: PPT(WP)484/2004/G

Tarikh: 15 Nov 2005

Tetuan Sidek Teoh Wong & Dennis

Peguambela & Peguamcara

Level 32, Menara TH Perdana

1001, Jalan Sultan Ismail

50250 Kuala Lumpur

Tuan

Dalam Perkara MTKL Penggulungan Syarikat No. D5-28-248-2003

Ber : Zaitun Marketing Sdn. Bhd.

Per :Permohonan Di Bawah Seksyen 236 Akta Syarikat 1965

MTKL Guaman No. D1-22-1919-99

Zaitun Marketing Sdn. Bhd

-Lwn-

Boustead Trading Sdn. Bhd

Adalah saya dengan segala hormatnya merujuk kepada perkara di atas.

2. Sukacita dimaklumkan, memandangkan pihak tuan telah memenuhi syarat-syarat sanksi, maka pihak kami tiada bantahan untuk tuan mewakili kes di atas.

3. Sekian untuk makluman dan tindakan pihak tuan selanjutnya.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

t.t.

(SHARIFAH NOORAINI BT SYED OSMAN)

b.p. Pengarah Insolvensi Negeri

Cawangan Wilayah Persekutuan

b.p. Ketua Pengarah Insolvensi Malaysia

[24] At the outset it is pertinent to observe that exh D of encl 132 is addressed to one 'Encik Khaidzir bin Haji Ishak' and not to Messrs Sidek Teoh. It is my finding that exh D of encl 132, judging by its form and content, is clearly not a letter from the official receiver appointing Messrs Sidek Teoh to represent the official receiver and liquidator in legal proceedings involving the plaintiff company. It is merely a letter by the official receiver *approving* the appointment of Messrs Sidek Teoh by one Encik Khaidzir bin Hj Ishak, a former director of the plaintiff company (that

A has now been wound up), to represent the plaintiff company in legal proceedings; pursuant to an application by the said Encik Khaidzir. A close examination of the content of the letter (which states, inter alia, either directly or indirectly, that the official receiver would not be giving instructions to Messrs Sidek Teoh in respect of what steps to be taken in
B respect of the legal proceedings, nor would be paying the fees of Messrs Sidek Teoh) clearly shows that the appointment of Messrs Sidek Teoh was meant to be made by the Encik Khaidzer and not by the official receiver, with the role of the official receiver being merely that of an 'approving authority'; and that Messrs Sidek Teoh would act for the wound up company rather than for the
C official receiver, and would take instructions from Encik Khaidzir.

[25] Now, it is pertinent to ask: why should the appointment of the advocate be made by Encik Khaidzir, when the appointment should have been made by the official receiver? Where is the provision of law in the
D Companies Act which empowers a former director of a company that has been wound up to appoint an advocate for the purpose of legal proceedings involving the said company? Where is the provision of law which makes the official receiver merely an approving authority (in respect of such appointment)? There appears to be a serious misconception of the law on the
E part of the official receiver as well as on the part of Encik Khaidzir.

[26] Reverting to exh A of encl 124, this letter, which is a follow-up to the letter exhibited vide exh D of encl 132, likewise does not say that Messrs. Sidek Teoh are being appointed to represent the official receiver: the letter
F merely says 'kami tiada bantahan untuk tuan mewakili kes di atas' which must be understood to merely mean that the official receiver have no objection to Messrs Sidek Teoh representing the wound up plaintiff in these proceedings. In other words, exh A of encl 124 is merely a 'no objection' letter. Hence this letter is also not a letter of appointment of Messrs Sidek
G Teoh by the official receiver.

[27] Be that as it may, in passing I wish to remark here that it is rather perplexing to note that the official receiver's letter at exh A of encl 24 merely
H states 'kami tiada bantahan' when earlier the official receiver has regarded himself as having the role of an 'approving authority' and, in fact, in his letter at exh. D had used the words 'permohonan tuan untuk melantik Tetuan Sidek Teoh Wong & Dennis … adalah diluluskan'.

I **[28]** More tellingly, however, none of these letters contain any instructions whatsoever regarding the conduct of the present action, including instructions to take out injunction proceedings.

[29] To sum up, it is clear that neither exh D of encl 132 nor exh A of encl 124 can be said to be a letter of appointment issued to Messrs Sidek Teoh for their appointment as advocate and solicitors representing the official receiver and liquidator to conduct these proceedings of the wound up plaintiff on the official receiver's behalf. These two letters confirm the fact that the appointment of Messrs Sidek Teoh was made, not by the official receiver, but by Encik Khaidzir.

[30] In conclusion, I hold as follows:

(a) the official receiver and liquidator cannot appoint an advocate and solicitor to bring or defend an action or other legal proceeding solely by relying on s 236(2)(a) of the Companies Act 1965 independently of s 236(1)(e) of the said Act.

(b) any appointment of an advocate and solicitor by the official receiver and liquidator must be pursuant to s 236(1)(e), meaning that such an appointment must be with the prior authority of the court or the committee of inspection.

(c) in the present case there is no such authorisation in respect of the purported appointment of Messrs Sidek Teoh.

(d) even assuming the official receiver and liquidator can appoint an advocate and solicitor to bring or defend an action (or any other legal proceeding) solely by relying on s 236(2)(a) of the Companies Act, still, neither the letter at exh D of encl 132 nor the letter at exh A of encl 124 is a letter of appointment of an advocate and solicitors issued to Messrs Sidek Teoh by the official receiver for the purpose of prosecuting the plaintiff's claim in the present case.

(e) exhibit D of encl 132 and exh A of encl 124 show that the appointment of Messrs Sidek Teoh as an advocate to represent the plaintiff company in legal proceedings was in fact made by a former director of the plaintiff's company, namely, one Encik Khaidzir, with the official receiver being merely an 'approving authority'; and in filing encl 125, Messrs Sidek Teoh takes instructions from the said Encik Khaidzir, rather than from the official receiver and liquidator; and these acts are contrary to the provisions of the Companies Act.

(f) Since the appointment of Messrs Sidek Teoh was invalid, and further the filing of encl 125 was never on the instruction of the official receiver but, instead, on the instruction of a person (Encik Khaidzir) who in law is not authorised to give such instruction, it must, therefore, follow that the filing of encl 125 (together with the affidavits) is also not valid.

A **[31]** Accordingly encl 125 must be dismissed with costs.

Application dismissed with costs.

B Reported by K Nesan

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